92-1618

No. _____

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1992

THIERRY KERVYN,

Petitioner,

vs.

LARRY K. DEPRIEST, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an agreement reached during a deposition to dismiss the case, which agreement is later withdrawn, is sufficient to comply with the requirements of Fed. R. Civ. P. 41(a)(1)(ii) when no stipulation of dismissal was filed or signed by all parties who appeared in the action.

2. Whether the execution and filing requirements of Fed. R. Civ. P. 41(a)(1)(ii) can be met by the use of Fed. R. Civ. P. 32(a)(2) even though the deposition is neither signed nor filed.

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No. _____

In The

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October Term, 1992

THIERRY KERVYN,

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vs.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Thierry Kervyn ("Petitioner") respectfully prays that this Court issue a Writ of Certiorari to review the Judgment of the Court of Appeals for the Fifth Circuit in No. 92-4366 entered on November 6, 1992, with rehearing denied on January 7, 1993.

OPINION BELOW

The judgment of the Court of Appeals for the Fifth Circuit on the original appeal was not published and appears in Appendix B. The order of the United States

Court of Appeals for the Fifth Circuit denying Petitioner's Petition for Rehearing was not published and appears in Appendix C.

JURISDICTION

On November 6, 1992, the Court of Appeals for the Fifth Circuit rendered its decision and entered judgment in Case No. 92-366 (Appendix B). A Petition for Rehearing was denied by order entered on January 7, 1993 (Appendix C). Jurisdiction is invoked under the provisions of 28 U.S.C. § 1254(1) for the reason that the decision of the Court of Appeals for the Fifth Circuit is in direct conflict with the controlling precedent concerning the interpretation of Fed. R. Civ. P. 41(a)(1)(ii) in *United States v. Transocean Air Lines, Inc.*, 356 F.2d 702 (5th Cir. 1966) as well as its holdings in *Anderegg v. High Standard, Inc.*, 825 F.2d 77 (5th Cir. 1987) and *Valley Ranch Development Co., Ltd. v. Federal Deposit Insurance Corp.*, 960 F.2d 550 (5th Cir. 1992) which determined that Tex. R. Civ. P. 11 was applicable, as a rule of substance, to diversity cases tried in the Federal Court system. Additionally, the Court of Appeals for the Fifth Circuit's decision contravenes the Texas Supreme Court authority set out in *London Market Companies v. Schattman*, 811 S.W.2d 550 (Tex. 1991) and *Kennedy v. Hyde*, 682 S.W.2d 525 (Tex. 1984).

STATUTORY PROVISIONS INVOLVED

Fed. R. Civ. P. 32(a)(2) (Appendix D); Fed. R. Civ. P. 41(a)(1)(ii) (Appendix E); and Tex. R. Civ. P. 11 (Appendix F).

STATEMENT OF THE CASE

The Court of Appeals for the Fifth Circuit affirmed the order of the District Court for the Eastern District of Texas, Paris Division, dismissing the Petitioner's case. The dismissal with prejudice was predicated upon a statement placed in a deposition by Petitioner's counsel that Petitioner would dismiss his case with prejudice. The deposition transcript contains an acknowledgement by the Petitioner that he concurs with the decision to dismiss.

The deposition of the Petitioner was being taken in connection with claims which he had made in an Original Complaint filed on December 12, 1988, alleging fraud, conspiracy to defraud, and legal malpractice against the several defendants named in the Complaint. On May 5, 1989, a First Amended Complaint was filed adding causes of action of constructive fraud, alter ego, vicarious liability, breach of fiduciary duty, and violations of the Texas Deceptive Trade Practices-Consumer Protection Act. The deposition was taken in Brussels, Belgium on April 23-25, 1990. The Petitioner is a Belgian national who resides in Belgium.

On August 2, 1990, the Petitioner's counsel filed his Motion to Withdraw without either the signature or consent of the Petitioner. The motion was predicated upon a substantial conflict of interest between the attorney and the Petitioner. The docket for this case (Appendix G) shows that the District Court signed its order on August 22, 1990, allowing the attorney to withdraw. The docket further shows that on June 28, 1991, new counsel appeared for the Petitioner, and thereafter, discovery in the trial court action was recommenced. On January 2, 1992, the Defendants in the trial court action filed a Motion to Dismiss alleging that the statements of counsel and the acquiescence of the Petitioner during his deposition constituted a voluntary stipulation of dismissal under Fed. R. Civ. P. 41(a)(1)(ii). On March 6, 1992, the trial court signed and entered an order dismissing the Petitioner's cause of action with prejudice.

The trial court in its decision (Appendix A) reasoned that the deposition testimony of the Petitioner should be admitted as evidence in deciding the Defendant's Motion to Dismiss. The trial court found that the Petitioner made an unequivocal declaration under oath that he desired to dismiss his cause of action. The trial court further found that the declaration was the equivalent of a stipulation made in open court.

On appeal the Petitioner argued that the requirements of Fed. R. Civ. P. 41(a)(1)(ii) were not met since the alleged stipulation was neither filed nor signed. Petitioner also argued that the alleged stipulation was not available to support the Motion to Dismiss because it was void under Tex. R. Civ. P. 11 and further because it had been revoked or withdrawn prior to the moment the trial

court entered its Order of Dismissal on March 6, 1992. Finally, the Petitioner argued in the Petition for Rehearing that the deposition testimony was nothing more than an out of court admission which was capable of being contravened, contradicted or explained and could not, by itself, satisfy the requirements of Fed. R. Civ. P. 41(a)(1)(ii). The Court of Appeals for the Fifth Circuit affirmed the trial court's decision on November 6, 1992, and denied the Petitioner's Petition for Rehearing on January 7, 1993.

ARGUMENT

The deposition testimony which forms the basis of the Defendants' Motion to Dismiss is as follows:

> Q. Mr. Kervyn, I wish to ask you – Overnight, since the depositions were adjourned yesterday, is it true that you have made a decision that you wish to dismiss your case that has been filed here?
>
> A. Yes.
>
> Q. And, do you understand that if you dismiss this case that it will be what American law calls "with prejudice," that is, that you will never again be able to refile this case?
>
> A. Yes, I understand that.
>
> Q. And, you understand that the court costs that have been spent up to this time will be your costs to be paid?
>
> A. I can understand that.

Q. And, you understand also that at the same time that the dismissal occurs that I will withdraw from being your lawyer?

A. Yes.

Q. And, Mr. Kervyn, when I return to America I will prepare the necessary documents and send them to you in Belgium, both for the dismissal of the cases, as well as my withdrawal as your attorney. And, do you agree that you will execute and return those documents promptly to me to be filed with the Court?

A. Yes.

MR. LOVETT: That's all I have. Thank you.

This alleged stipulation, which the Defendants sought to enforce in the trial court action, was deficient in at least three (3) respects:

1. the Petitioner did not join in filing the alleged stipulation of dismissal as required by Fed. R. Civ. P. 41(a)(1)(ii);

2. the alleged stipulation of dismissal was not *signed* by *all* parties who had appeared in the cause as required by Fed. R. Civ. P. 41(a)(1)(ii); and

3. the alleged stipulation of dismissal is void because it fails to comply with Tex. R. Civ. P. 11 in that the alleged stipulation of dismissal is not signed and filed by all of the parties, the alleged stipulation of dismissal was not made in open court and consent to the alleged stipulation of dismissal was revoked and withdrawn prior to the moment the trial

court rendered its Order dated March 6, 1992.

First, Defendants asserted in the trial court action that the Petitioner's deposition testimony constituted a formal, voluntary stipulation of dismissal under Fed. R. Civ. P. 41(a)(1)(ii) which provides in pertinent part as follows:

> **(a) Voluntary Dismissal: Effect Thereof.**
>
> **(1) By Plaintiff; by Stipulation.** Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court . . . *(ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action*. . . . (emphasis added).

In *United States v. Transocean Air Lines, Inc.*, 356 F.2d 702, 705 (5th Cir. 1966), the 5th Circuit held that Fed. R. Civ. P. 41(a)(1)(ii) "requires that for a dismissal by stipulation to be effective, *the stipulation must be filed* by all parties who have appeared in the cause." (emphasis added). Despite the provisions of Fed. R. Civ. P. 41(a)(1)(ii) "a stipulation should not be construed as a 'stipulation of dismissal' in the absence of an unequivocal statement by the parties that it was so intended." *United States v. MacEvoy*, 10 F.R.D. 323, 327 (D.C.N.J. 1950). *See also Vuitton et Fils S.A. v. J. Young Enterprises, Inc.*, 609 F.2d 1335, 1337 (9th Cir. 1979) – unless there is an unequivocal statement by all the parties, *after clarification by the court from all the parties, if necessary*, a final judgment based upon the stipulation should not be entered. Under the express terms of Fed. R. Civ. P. 41(a)(1)(ii), all the parties

including the Petitioner must file the voluntary stipulation of dismissal. The Petitioner did not join in the filing of the alleged stipulation of dismissal and, therefore, the alleged stipulation of dismissal is not voluntary and fails to comply with Fed. R. Civ. P. 41(a)(1)(ii).

Second, the requirements of Fed. R. Civ. P. 41(a)(1)(ii) have not been met for the reason that not all parties to the action *signed* the alleged stipulation of dismissal. No party signed the stipulation since the alleged stipulation was part of a deposition transcript and all parties intended that formal, written documents would be prepared, signed and filed as is shown by the deposition statements. Therefore, the alleged stipulation of dismissal on its face fails to comply with Fed. R. Civ. P. 41(a)(1)(ii).

Third, in addition to the deficiencies of the alleged stipulation of dismissal under Fed. R. Civ. P. 41(a)(1)(ii), it failed to meet the requirements of Tex. R. Civ. P. 11, the applicable substantive law of the forum, which provides:

> Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced *unless it be in writing, signed and filed* with the papers as part of the record, *or unless it be made in open court and entered of record.* (emphasis added).

The Court of Appeals for the Fifth Circuit has expressly ruled that although Tex. R. Civ. P. 11 is a Texas procedural rule, it "is nonetheless also a rule of substance akin to the parol evidence rule and applicable for that reason to Texas diversity cases tried in our federal court system." *Anderegg v. High Standard, Inc.*, 825 F.2d 77, 80-81 (5th Cir.

1987). *See also Condit Chemical & Grain Co. v. Helena Chemical Corp.*, 789 F.2d 1101, 1102 (5th Cir. 1986). Tex. R. Civ. P. 11 is therefore applicable to the alleged stipulation of dismissal since the trial court action was a diversity case.

The decision of the trial court which was affirmed by the Court of Appeals for the Fifth Circuit conflicts with the recent cases of *Valley Ranch Development Co. Ltd. v. FDIC*, 960 F.2d 550 (5th Cir. 1992) and *Anderegg v. High Standard, Inc.*, 825 F.2d 77 (5th Cir. 1987) which form the controlling precedent for the Court of Appeals for the Fifth Circuit for the application of Tex. R. Civ. P. 11 to agreements between parties and attorneys. In addition, the decision of the trial court conflicts with the recent Texas Supreme Court cases of *London Market Companies v. Schattman*, 811 S.W.2d 550 (Tex. 1991) and *Kennedy v. Hyde*, 682 S.W.2d 525 (Tex. 1984) which form the controlling precedent for the interpretation of Tex. R. Civ. P. 11.

The case of *Valley Ranch Development Co. Ltd. v. Federal Deposit Insurance Corp.*, 960 F.2d 550 (5th Cir. 1992) establishes the most recent controlling precedent in the Court of Appeals for the Fifth Circuit for applying Texas law, including Tex. R. Civ. P. 11, to agreements and stipulations among parties and their attorneys. The Court in *Valley Ranch* held:

> Under Texas law, a settlement agreement will not be enforced unless it is written and filed as part of the record. Tex. R. Civ. P. 11 (Vernon Supp. 1991); *see also Anderegg*, 825 F.2d at 80-81. Indeed, *"the moment the existence of an oral contract between parties . . . is contested, rule 11 precludes further examination of the agreement". Coke v. Coke*, 802 S.W.2d 270, 277 (Tex. App. – Dallas

> 1990, writ denied). This settlement never met the Texas standards for an enforceable agreement.

(emphasis added). *Valley Ranch*, 960 F.2d at 553. Since the Petitioner clearly contested the existence of an oral agreement between the parties on January 17, 1992, prior to the moment the trial court rendered its Order dismissing the Petitioner's causes of action on March 6, 1992, Tex. R. Civ. P. 11 precludes the Court from further examination of the agreement.

The Texas Supreme Court has stated that Tex. R. Civ. P. 11 is a "*minimum* requirement" for the enforcement of all agreements concerning pending suits including, but not limited to, agreed judgments. *Kennedy v. Hyde*, 682 S.W.2d 525, 528 (Tex. 1984). The Texas Supreme Court has also made it clear that Tex. R. Civ. P. 11 applies to *all* agreements touching pending suits, including settlement agreements. *See Kennedy*, 682 S.W.2d at 528. The *Kennedy* case is also similar to this case in at least (4) respects: (i) the alleged oral settlement in *Kennedy* was entered into at a scheduled deposition which instead led the parties to settlement negotiations, (ii) the parties agreed to prepare and sign documents settling the case, (iii) one party refused to sign the proposed settlement agreement and (iv) the other parties then attempted to enforce the alleged oral settlement agreement entered into at the deposition. *Kennedy*, 682 S.W.2d 525 at 526. The Texas Supreme Court in *Kennedy* found that the agreement entered into at a deposition outside the presence of the Court did not meet the requirements of Tex. R. Civ. P. 11. *Kennedy*, 682 S.W.2d at 530. The validity of the *Kennedy* decision was reaffirmed by the Texas Supreme Court as

recently as June 1991 when the Court held that "[o]nce the existence of such an agreement becomes disputed, it is unenforceable unless it comports with" the requirements of Tex. R. Civ. P. 11. *London Market Companies v. Schattman*, 811 S.W.2d 550, 552 (Tex. 1991). The Petitioner's position is that the alleged agreement was effectively revoked and withdrawn prior to the moment the trial court rendered its Order dismissing the Petitioner's causes of action.

Texas law renders the alleged stipulation of dismissal unenforceable since it was merely an agreement to agree, which is not enforceable by Texas courts. *See Soloman v. Greenblatt*, 812 S.W.2d 7, 15 (Tex. App. – Dallas 1991, no writ). The deposition testimony reflects that the Petitioner's attorney agreed to prepare the necessary documents upon his return to America and to send the documents to the Petitioner for his signature. The deposition clearly demonstrates that the parties never intended the Petitioner's testimony to be the final expression of an agreement to dismiss this cause with prejudice. The relevant portion of the Petitioner's deposition states as follows:

> Q. And, Mr. Kervyn, when I return to America I will prepare the necessary documents and send them to you in Belgium, both for the dismissal of the cases, as well as my withdrawal as your attorney. And, do you agree that you will execute and return those documents promptly to me *to be filed* with the Court?
>
> A. Yes.
>
> MR. LOVETT: That's all I have. Thank you.

(emphasis added). Defendants' counsel made no objection to this proposed arrangement which is a material part of the alleged stipulation of dismissal. Therefore, all parties contemplated that the statement was a mere agreement to agree. In *Buffalo Bag Company v. Joachim*, 704 S.W.2d 482, 484 (Tex. App. – Houston [14th Dist.] 1986, no writ) the court found that the use of the words "to be", as used by the Petitioner's attorney in the alleged stipulation of dismissal, indicate that further future action was necessary so that the party is not bound by the stipulated agreement when the Court had not yet rendered judgment. Unquestionably, all parties intended that further documents were to be prepared to finalize the Petitioner's decision to dismiss the cause. Therefore, the Petitioner's statement is a mere agreement to agree which is unenforceable by Texas courts. *Soloman v. Greenblatt*, 812 S.W.2d at 15.

As a general rule, the trial court should not play an active role in approving the adequacy of an agreement to settle or compromise the parties' claims in a lawsuit, and the court need not and should not get involved except in exceptional situations. *United States v. City of Miami, Florida*, 614 F.2d 1322, 1330-1331 (5th Cir. 1980). The trial court should play only a ministerial role in rendering a judgment in strict accordance with the parties' agreement and only after all of the requisites of Tex. R. Civ. P. 11 have been satisfied. *Guynn v. Corpus Christi Bank & Trust*, 580 S.W.2d 902, 906 (Tex. Civ. App. – Corpus Christi 1979), aff'd following remand 620 S.W.2d 188 (Tex. Civ. App. – Corpus Christi 1981, writ ref. n.r.e.). All parties to an agreement must agree upon all terms and the court has no power to supply missing terms or any essential

details not previously agreed to by the parties. *Matthews v. Looney,* 123 S.W.2d 871, 872 (Tex. Comm'n App., Section A 1939, opinion adopted).

Here, the court in the trial court action took an active role in attempting to involuntarily enforce an alleged out-of-court agreement which was clearly repudiated by the Petitioner, was not made in open court, was not filed as part of the record by all the parties to the trial court action and was not signed by all the parties to the trial court action. In order to comply with Tex. R. Civ. P. 11, the agreement must be *filed* as part of the record in the cause or made in *open court* and *entered* of record. *Trois v. Synnott,* 758 S.W.2d 384, 386 (Tex. App. – Austin 1988, no writ). *See also Baccus v. Baccus,* 808 S.W.2d 694, 699 (Tex. App. – Beaumont 1991, no writ) – "An agreement for judgment will not be enforced unless the agreement is reduced to writing, signed and *filed* with the papers as part of the record, or unless it be made in *open court* and *entered* of record." (emphasis added). As set forth above with respect to the Petitioner's argument concerning Fed. R. Civ. P. 41(a)(1)(ii), the alleged stipulation of dismissal was not signed by all of the parties in the trial court action, was not filed by all of the parties in the trial court action, and was not made in open court and entered of record in the trial court action. Clearly, the trial court went far beyond its ministerial role by attempting to involuntarily force the alleged agreement on the Petitioner which the Petitioner had demonstrated was against his wishes before the moment the court rendered its Order dated March 6, 1992.

The deposition statement is unenforceable against the Petitioner because the Petitioner effectively revoked and

withdrew his consent to the alleged agreement prior to the time the court in the trial court action rendered its Order dismissing the Petitioner's causes of action. Plaintiff's Response to Defendants' Motion to Dismiss and Brief filed by the Petitioner on January 17, 1992 (Appendix G, entry 210), is an unmistakable repudiation of the alleged agreement to dismiss the trial court action. The Texas Supreme Court has held that "a judgment based upon an agreement of the attorneys, cannot be rendered by a court when consent of one of the parties thereto is wanting." *Quintero v. Jim Walter Homes, Inc.*, 654 S.W.2d 442, 444 (Tex. 1983).

A party may revoke its consent to an agreement to compromise or settle a case at any time before the rendition of a judgment. *Samples Exterminators v. Samples*, 640 S.W.2d 873, 874 (Tex. 1982). The Petitioner had the right to revoke his consent to the alleged stipulation "since the settlement agreement had not been signed as part of the record pursuant to Tex. R. Civ. P. 11" at any time prior to the moment the trial court rendered its Order dated March 6, 1992. *Rizk v. Millard*, 810 S.W.2d 318, 321 (Tex. App. – Houston [14th Dist.] 1991, no writ). Consent by all parties to an agreement to settle or compromise a case must exist at the time an agreed judgment is *rendered*. *Kennedy v. Hyde*, 682 S.W.2d at 528. *See also Baccus v. Baccus*, 808 S.W.2d at 699 – "Notwithstanding a valid Texas Rule of Civil Procedure 11 agreement, consent must exist at the time an agreed judgment is *rendered*" and judgment cannot be rendered on an agreement if consent of one of the parties has been withdrawn or is lacking and "even though such consent may have earlier been given." (emphasis added). Therefore, the allegation that

the parties, including the Petitioner, at one time had an agreement to dismiss the trial court action is irrelevant since the parties did not comply with the requirements of Tex. R. Civ. P. 11 prior to the moment the trial court rendered its Order.

In *Burnaman v. Heaton*, 240 S.W.2d 288, 291 (Tex. 1951), the Texas Supreme Court stated:

> A valid consent judgment cannot be rendered by a court when consent of one of the parties thereto is wanting. It is not sufficient to support the judgment that a parties' consent thereto may at one time have been given; *consent must exist the very moment that the court undertakes to make the agreement the judgment of the court.*

(emphasis added). If a court has knowledge, prior to the rendition of judgment, that a party does not consent to a judgment, "the trial court lack[s] power to render a judgment by consent and without a trial", even in the event that the parties had previously entered into an agreement of settlement and compromise. *Trois v. Synnott*, 758 S.W.2d at 386 citing *Quintero v. Jim Walter Homes, Inc.*, 654 S.W.2d at 444. The docket, Appendix G, clearly shows that discovery had been reinstituted by the Petitioner prior to the court dismissing the case. Further, the Petitioner had filed his Response to the Defendants' Motion to Dismiss indicating a repudiation of any prior consent. The cumulative effect was that the court knew that the Petitioner wanted to proceed with his litigation. Therefore, the trial court had knowledge that the Petitioner had revoked and withdrawn his consent to the alleged agreement prior to the date its Order dated March 6, 1992, was

rendered. As a result, the Order is void. *Samples Exterminators v. Samples,* 640 S.W.2d at 875.

A judgment's "rendition is the judicial act by which the court settles and declares the decision of the law upon *the matters at issue.*" (emphasis in original). *Coleman v. Zapp,* 105 Tex. 491, 151 S.W. 1040, 1041 (1912). *See also Buffalo Bag v. Joachim,* 704 S.W.2d 482 (Tex. App. – Houston [14th Dist.] 1986, no writ) – "[a] rendition of judgment is the pronouncement by the court of its conclusions and decision upon the matters submitted to it for adjudication. "A judgment is in fact rendered whenever the trial judge officially announces his decision in *open court* . . . in his official capacity for his official guidance whether orally or by written memorandum the sentence of law pronounced by him in any cause." (emphasis added). *Comet Aluminum Company v. Dibrell,* 450 S.W.2d 56, 59 (Tex. 1970). *See also Samples Exterminators v. Samples,* 640 S.W.2d at 875. However, "[i]t is clear that had only the terms of the agreement been dictated in *open court* with the attorneys' announcement that the judgment would be prepared and submitted for the trial court's signature at a later date, a rendition of judgment would not have occurred." (emphasis added). *Buffalo Bag Company v. Joachim,* 704 S.W.2d at 484. In the trial court action, the parties did not dictate the terms of the alleged stipulation of dismissal in open court. Rather, the Defendants relied upon excerpts from the transcript of the oral deposition of the Petitioner to request the dismissal and the trial court exclusively utilized the deposition statement to underpin its Judgment. Even assuming the alleged stipulation of dismissal had been dictated in open court, the alleged agreement would not comply with Tex.

R. Civ. P. 11, according to *Buffalo Bag*, cited above, because the parties expressly provided that further agreements were to be prepared, signed and presented to the court.

The term "open court" has its own special legal connotation which clearly requires that proceedings be in a courtroom and before a judge. Cf. *U.S. v. Carey*, 895 F.2d 318, 325 (7th Cir. 1990); *Donald v. Jones*, 445 F.2d 601, 604 (5th Cir. 1971); and *Loke v. State*, 254 S.W.2d 137, 138 (Tex. Crim. App. – 1953, no writ). Similarly, in *Anderegg v. High Standard, Inc.*, 825 F.2d 77, 80-81 (5th Cir. 1987), the 5th Circuit has held that the "made-in-open-court" exception to Tex. R. Civ. P. 11 requires that the agreement be read "in the presence of the court." The conclusion that the term "open court" in the Texas Rules of Civil Procedure requires that the proceedings be in a courtroom before a judge is inescapable from the requirement that "[I]t is not sufficient that a parties' consent to an agreed judgment may have been given at one time or another, but rather, the consent must exist at the very moment the trial court undertakes to make the agreement a part of the record and judgment of the court." *Guynn v. Corpus Christi Bank & Trust*, 580 S.W.2d 902, 906 (Tex. Civ. App. – Corpus Christi 1979, aff'd following remand 620 S.W.2d 188 (Tex. Civ. App. – Corpus Christi, 1981, writ ref. n.r.e.). *Buffalo Bag Company v. Joachim*, 704 S.W.2d at 484. *See also Carter v. Carter*, 535 S.W.2d 215, 217 (Tex. Civ. App – Tyler 1976, writ ref. n.r.e.).

In *Anderegg*, plaintiff's counsel made an announcement in open court of an oral settlement, which defendant's counsel instantly disavowed. The Court held that

the "made-in-open-court" exception to Tex. R. Civ. P. 11 was not met. The Court held:

> It is clear that the Rule contemplates that more is required for the enforcement of such an agreement than that it be a valid contract. That something *more* is its reduction to writing and signature, or their substantial equivalents: dictation into the record of the agreement's substance and assent to it on the record by all parties sought to be bound. An "agreement" such as the one in this case, one in which the terms are shouted at the bench by counsel for one side and immediately repudiated by the other, might well consist of something *less* than a contract valid under general law – in such a case there may have been no antecedent agreement between counsel at all. . . . We conclude that the "made-in-open-court" exception to Rule 11's requirement of a signed writing for enforcement of agreements between counsel requires the substantial equivalent of a writing and signatures: a statement into the record of the terms of the agreement *in the presence of the court*, plus the agreement of the parties (or their counsel) to be bound by it affirmatively stated on the record.

Anderegg v. High Standard, Inc., 825 F.2d at 80-81.

The Defendants in the trial court action have only presented to the court an alleged agreement to agree. Since all parties clearly intended that formal written documents would be prepared, signed by all of the parties and submitted to the court for its consideration, no "open court" announcement has been made. This, coupled with the undisputed fact that prior to the rendition of the

Order dated March 6, 1992, the Petitioner clearly repudiated the alleged agreement by revoking and withdrawing his consent, the trial court's order is outside the bounds of both the federal and state law requirements governing dismissals by stipulation. Therefore, the Order dated March 6, 1992, is void.

Defendants placed great emphasis on their contention that the statements made by the Petitioner at his deposition on May 24, 1990, may be used against the Petitioner as evidence at trial. While the Petitioner does not dispute that the deposition excerpts may be used as evidence of the Petitioner's testimony on the date of his deposition, such evidence can be contradicted or explained in a later proceeding and is only an out of court admission which is subject to explanation. The deposition evidence merely establishes that the Petitioner entered into an agreement to agree to dismiss his causes of action for some reason, but the same evidence also clearly provides that necessary documents would be prepared, signed and filed with the Court. As more fully set forth above, the Petitioner may revoke or withdraw his consent to an agreement at any time prior to the moment that an agreement which complies with the requirements of Tex. R. Civ. P. 11 is approved by the Court and judgment is entered accordingly. Notwithstanding Tex. R. Civ. P. 11, it is well settled that a statement at a deposition "is merely another piece of evidence" which may be considered by the fact finder. *McMillan v. Gage*, 165 S.W.2d 754, 755 (Tex. Civ. App. – Austin 1942, writ ref'd. want merit). The statement at the deposition may be subsequently contradicted or explained leaving the factual dispute to the fact finder to determine. *Molnar v. Engels, Inc.*, 705 S.W.2d 224,

226 (Tex. App. – San Antonio 1985, writ ref'd n.r.e.). In *Molnar* the Court stated:

> Statements in a party's deposition have only the force of an out of court admission and may be contradicted or explained in a summary judgment proceeding.

Other cases which have held that deposition testimony is nothing more than an out of court admission which may be contravened are *Combs v. Morrill,* 470 S.W.2d 222, 224 (Tex. Civ. App. – San Antonio 1971, writ ref'd n.r.e.); and *Foster v. Woodward,* 134 S.W.2d 417, 420 (Tex. Civ. App. – Beaumont 1939, no writ). The rule that a previous statement by a party is binding on him at trial is not applicable when the party subsequently modifies or explains his former testimony. See *Foster* at 420. While *Molnar* and the other cases deal with a summary judgment situation, there is no real difference between a summary judgment proceeding and a motion to dismiss since both are outcome determinative. The dismissal of the Petitioner's causes of action after the Petitioner had effectively revoked or withdrawn the agreement, prevents the Petitioner from explaining or modifying his previous statements to the fact finder. *Southern Lloyds v. Jones,* 345 S.W.2d 435, 438 (Tex. Civ. App. – Austin 1961, no writ). If, in the summary judgment context, deposition testimony is nothing more than an out of court admission which may be later contradicted or explained, then the Petitioner should have had the same opportunity when faced with a motion to dismiss. This entire argument clearly demonstrates that the agreement allegedly reached during the Petitioner's deposition on May 24, 1990, simply did not meet the requirements of Tex. R. Civ. P. 11 since

the alleged agreement was at a deposition; by definition it was not in "open court", as the courts in *Molnar, Combs* and *Foster* have held; and was revoked and withdrawn on January 17, 1992, prior to the moment the trial court rendered its Order dated March 6, 1992.

CONCLUSION

The law in the Fifth Circuit has always required that Tex. R. Civ. P. 11 be applied as a rule of substance in diversity cases. The Texas Supreme Court has repeatedly defined the requirements for compliance with this rule to avoid disputes over outcome determinative stipulations. The Texas rule is not significantly different than Fed. R. Civ. P. 41(a)(1)(ii); however, a more strict construction of the Texas rule has been routinely applied. The intent of the Texas rule as well as Fed. R. Civ. P. 41(a)(1)(ii) should not be thwarted simply by allowing deposition testimony which may have been admissible at the time of trial to be used in an attempt to bypass the requirements of both the Texas rule and Fed. R. Civ. P. 41(a)(1)(ii). Fed. R. Civ. P. 32(a)(2) is merely a guidepost for the use of depositions at trial. It is not a substitution for other evidentiary or procedural requirements.

Respectfully submitted,

LARRY R. BOYD
WESNER COKE BOYD & CLYMER, P.C.
5430 LBJ Freeway, Suite 660
Dallas, Texas 75240
Telephone: (214) 770-2600

Attorneys for Petitioner
Thierry Kervyn

NO.

In The

Supreme Court Of The United States

OCTOBER TERM, 1992

THIERRY KERVYN,
Petitioner,

vs

LARRY K. DEPRIEST, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX

APPENDIX A

EOD 3-10-92

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
PARIS DIVISION

THIERRY KERVYN	§	
	§	
v.	§	
	§	
LARRY K. DEPRIEST,	§	NO. P-88-75-CA
JAMES S. GLANKLER,	§	
BROWN, GILLILAND,	§	
CHASE, ROBINSON &	§	
RAINES, ET AL	§	

ORDER

(Filed March 6, 1992)

On this day came on for consideration Defendants' Motion to Dismiss filed by defendants Glankler, Brown, Gilliland, Chase, Robinson & Raines; James S. Gilliland; Laurence D. Conn; Frank J. Glankler, Jr.; Lee James Chase, III; Michael A. Robinson; J. N. Raines; C. Barry Ward; John I. Houseal; Joseph Karl Wilcox; K. W. Rogers, III; and O. C. Carr, and Motion to Dismiss by Defendant, Larry K. DePriest, and the Court having considered the motions and the response thereto, is of the opinion that the motions should be granted.

Plaintiff, Thierry Kervyn, a resident of Belgium, filed this suit on December 13, 1988. On February 21, 1989, plaintiff's original attorney, Jack Herrington, was allowed to withdraw as counsel and plaintiff was allowed to substitute Jim D. Lovett of Paris, Texas, as his counsel. On April 23, 1990, Mr. Lovett and counsel for the defendants

traveled to Belgium to depose plaintiff. On the second day of the deposition, while being questioned by his attorney, Mr. Lovett, the following occurred:

Q. Mr. Kervyn . . . is it true that you have made a decision that you wish to dismiss your case that has been filed here?

A. Yes.

Q. And, do you understand that if you dismiss this case that it will be what American law calls "with prejudice", that is, that you will never again be able to refile this case?

A. Yes, I understand that.

Q. And, you understand that the court costs that have been spent up to this time will be your costs to be paid?

A. I can understand that.

Q. And, you understand also that at the same time that the dismissal occurs that I will withdraw from being your lawyer?

A. Yes . . . I wish to leave now.

Q. And, Mr. Kervyn, when I return to America I will prepare the necessary documents and send them to you in Belgium, both for the dismissal of the cases, as well as my withdrawal as your attorney. And, do you agree that you will execute and return those documents promptly to me to be filed with the Court?

A. Yes.

MR. LOVETT: That's all I have. Thank you.

At that point in the deposition, plaintiff left the deposition room and never returned.

On August 2, 1990, Mr. Lovett filed a motion to withdraw as the plaintiff's attorney, but no formal stipulation of dismissal was ever filed. Mr. Lovett was permitted to withdraw as plaintiff's attorney on August 22, 1990.

Defendants contend that the questions and answers given by the plaintiff in the deposition are sufficient to constitute a voluntary dismissal under Fed. R. Civ. P. 41(a)(1)(ii) and that it is in effect a stipulation made in open court. Plaintiff contends that the stipulation is not effective because it was not signed by all the parties and filed.

The statements made by the plaintiff in his deposition are clear and unequivocal. They were made under oath. Plaintiff does not now deny that he made the agreement to dismiss his suit with prejudice and left the deposition. The stipulation was made by the plaintiff in his deposition, which was being taken in accordance with the Federal Rules of Civil Procedure. Rule 32(a)(2) of the Federal Rules of Civil Procedure states:

> At the trial or upon the hearing of a motion . . . so far as admissible under the rules of evidence applied as though the witness were then present and testifying . . . The deposition of a party . . . may be used by an adverse party for any purpose.

Plaintiff's deposition testimony containing his stipulation to dismiss this cause of action should be admitted as evidence and considered in deciding Defendants' Motions to Dismiss. Plaintiff made an unequivocal declaration under oath that he desired to dismiss his cause of action. His intent is clear and unambiguous. Defendants

did not object to plaintiff terminating the deposition after his stipulation and thus clearly indicated their agreement. The stipulation is the equivalent of a stipulation made in open court. Plaintiff should be bound by it.

It is, therefore, ORDERED that plaintiff's cause of action be, and the same is hereby, DISMISSED WITH PREJUDICE.

It is further ORDERED that costs shall be paid by the party incurring the same.

Signed this 6th day of March, 1992.

/s/ Paul Brown
UNITED STATES
DISTRICT JUDGE

Mid 3-10-92 to: Boyd
McLaughlin
Harrell
Kitner

APPENDIX B

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-4366

THIERRY KERVYN,

Plaintiff-Appellant,

VERSUS

LARRY K. DEPRIEST, JAMES S. GILLILAND, GLANKLER, BROWN, GILLILAND, CHASE, ROBINSON, AND RAINES, LAURENCE D. CONN, FRANK J. GLANKLER, JR., LEE JAMES CHASE, III, MICHAEL A. ROBINSON, J. N. RAINES, C. BARRY WARD, JOHN I. HOUSEAL, JOSEPH KARL WILCOX, K. W. ROGERS, III O. C. CARR, III, DEKO LAND & INVESTMENT CO., and RED RIVER FARM MANAGEMENT, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(3:88-CV-75)

(Filed Nov. 6, 1992)

Before DAVIS and JONES, Circuit Judges and PARKER[1], District Judge.

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[1] Chief Judge of the Eastern District of Texas, sitting by designation.

PER CURIAM:[2]

AFFIRMED: See Local Rule 47.6

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[2] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profe. - sion." Pursuant to that Rule, the Court has determined that this opinion should not be published.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4366

THIERRY KERVIN,

Plaintiff-Appellant,

versus

LARRY K. DEPRIEST, ET AL.,

Defendants-Apellees. [sic]

Appeal from the United States District Court
for the Eastern District of Texas

ON PETITION FOR REHEARING

(January 7, 1993)

Before DAVIS, JONES, and PARKER*, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED

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* Chief Judge of the Eastern District of Texas, sitting by designation.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE

APPENDIX D

Rule 32. Use of Depositions in Court Proceedings

(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Federal Rules of Evidence.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party

offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require the offeror to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action has been brought in any court of the United States or of any State and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the Federal Rules of Evidence.

(b) Objections to Admissibility. Subject to the provisions of Rule 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) [Abrogated]

(d) Effect of Errors and Irregularities in Depositions.

(1) *As to Notice.* All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) *As to Disqualification of Officer.* Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) *As to Taking of Deposition.*

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time

allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) ***As to Completion and Return of Deposition.*** Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

(As amended Mar. 30, 1970, eff. July 1, 1970; Nov. 20, 1972, eff. July 1, 1975; Apr. 29, 1980, eff. Aug. 1, 1980; Mar. 2, 1987, eff. Aug. 1, 1987.)

APPENDIX E

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

(1) ***By Plaintiff; by Stipulation.*** Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) ***By Order of Court.*** Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect Thereof. [Effective until Dec. 1, 1991. See, also, subd. (b) below.] For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(b) Involuntary Dismissal: Effect Thereof. [Effective on Dec. 1, 1991. See, also, subd. (b) above.] For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper

venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of Previously Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 2, 1987, eff. Aug. 1, failure of the plaintiff to prosecute or to com1987; Apr. 30, 1991, eff. Dec. 1, 1991.)

APPENDIX F

RULE 11. AGREEMENTS TO BE IN WRITING

Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record.

(Amended July 15, 1987, eff. Jan. 1, 1988.)

APPENDIX G

RCV JURY
APPEAL

U.S. District Court
Texas, Eastern (Paris)

CIVIL DOCKET FOR CASE #: 88-CV-75

Kervyn v. Depriest, et al
Assigned to:
Judge Paul Brown
Demand: $0,000
Lead Docket: None
Dkt# in other court: None

Filed: 12/13/88
Jury demand: Plaintiff
Nature of Suit: 190
Jurisdiction: Diversity

Cause: 28:1391 Personal Injury

THIERRY KERVYN
plaintiff

Larry R. Boyd
[COR LD NTC]
Wesner Coke Boyd & Clymer
5430 LBJ Freeway,
Suite 660
Dallas, TX 75240
214/770-2600

v.

LARRY K. DEPRIEST
defendant

James Donald McLaughlin
[COR LD NTC]
McLaughlin Hutchison & Hunt
(CORRECT)
38 First St NW
Paris, TX 75460
214/785-1606

JAMES S. GILLILAND defendant	Robert Stanford Harrell [COR LD NTC] Fulbright & Jaworski 1301 McKinney Street Suite 5100 Houston, TX 77010-3095 Harris 713/651-5151 FTS good David Norman Kitner [COR LD NTC] Strasburger & Price 901 Main St Suite 4300 PO Box 50100 Dallas, TX 75250 Dallas 214/651-4300 FTS good
GILLILAND, CHASE GLANKER	Robert Stanford Harrell

Docket as of April 9, 1992 3:47 pm

RCV JURY
APPEAL

INTERNAL USE ONLY: Proceedings include all events.
3:88cv75 Kervyn v. Depriest, et al

defendant	(See above) [COR LD NTC] David Norman Kitner (See above) [COR LD NTC]
LAURENCE D CONN defendant	

FRANK J. GLANKLER JR.
defendant

LEE JAMES CHASE III
defendant

MICHAEL A ROBINSON
defendant

J N RAINES
defendant

C. BARRY WARD
defendant

JOHN I HOUSEAL
defendant

JOSEPH KARL WILCOX
defendant

K W ROGERS III
defendant

O C CARR III
defendant

DEKO LAND & INVESTME defendant	James Donald McLaughlin (See above) [COR LD NTC]
INC RED RIVER FARM MANAG defendant	James Donald McLaughlin (See above) [COR LD NTC]

ALL DEFENDANTS
defendant

Docket as of April 9, 1992 3:47 pm

* * *

9-5-89	152	NOTICE of oral deposition of Thierry Kervyn on 10-9-89 in Dallas at 9:00 am bh
9-14-89	154	ANSWER of pltf to counterclaim filed by Deko Land bh
8-2-90	156	MOTION of atty Jim Lovett, atty for pltf, to WITHDRAW and for enlargement of time bh
8-22-90	159	ORDER granting mo of pltf for atty to withdraw and pltf shall cause his nmew counsel to enter appearance on or before 90 days from date of this order. PB dktd 8-23-90 cc:petr and attys on 8-23-90 by regular and certd mail bh
11-15-90	160	JOINT MOTION to EXTEND deadline for plaintiff to designate new counsel ss
11-16-90	163	ORDER granting mo to extend time for pltf to designate new counsel until 1-15-91. PB dktd 11-19-90 cc:pla and attys on 11-19-90 bh
1-11-91	164	JOINT MOTION for extension of time for pla to designate new counsel bh
1-15-91	167	ORDER granting joint mo for extension of time for pla to designate new counsel until 4-30-91. PB dktd 1-15-91 cc: pla and attys on 1-15-91 bh
6-17-91	168	ORDER that pla shall have counsel enter appearance on or before 30 days from date of signing of this order or case will be dismissed for want of prosecution. PB s/6-14-91 cc: pla and atty on 6-17-91 bhs

RCV JURY
APPEAL

INTERNAL USE ONLY: Proceedings include all events.
3:88cv75 Kervyn v. Depriest, et al

6/28/91	1	169	Notice of attorney appearance for Thierry Kervyn by Larry R Boyd (byh)
8/5/91	2	171	Scheduling order setting Deadline for filing of all pre-trial motions 5:00 2/14/92; Discovery cutoff 1/14/92; Pretrial order to be submitted on or before 5:00 2/21/92; Requested jury instructions by 5:00 2/21/92 for Inc Red River Farm Manag, for Deko Land & Investme, for O C Carr Iii, for K W Rogeıs Iii, for Joseph Karl Wilcox, for John I Houseal, for C. Barry Ward, for J N Raines, for Michael A Robinson, for Lee James Chase Iii, for Frank J Glankler Jr., for Laurence D Conn, for Gilliland, Chase Glanker, for James S. Gilliland, for Larry K. Depriest, for Thierry Kervyn; Final Pretrial conference on 9:00 2/28/92; Jury trial on 9:00 3/9/92; signed by Judge Paul Brown) cc: attys on 8-6-91 (byh) [Entry date 08/06/91]
12/2/91	3	174	Order denying mo of dft to dismiss and for more definite statement. (signed by Judge Paul Brown) cc:attys on 12-3-91 (bhs) [Entry date 12/03/91]
12/18/91	4	175	Motion by Larry K. Depriest to quash notice to date deposition (bhs)

1/2/92	–		Added party all defendants (bhs) [Entry date 01/03/92]
1/2/92	5	185	Motion by all defendants to dismiss (bhs) [Entry date 01/03/92]
1/2/92	6	188	Memorandum by all defendants in support of [5-1] motion to dismiss (bhs) [Entry date 01/03/92]
1/2/92	7	194	Affidavit by Robert Harrell for all defendants Re: Authenication deposition testimony of THierry Kervyn De Volkaersbeke (bhs) [Entry date 01/03/92]
1/3/92	–		Added party (bhs)
1/3/92	8	205	Response by Thierry Kervyn to [4-1] motion to quash notice of deposition (bhs)
1/7/92	9	209	Order denying [4-11] motion to quash notice to take deposition, but place of taking deposition be changed to McLaughlin, Hutchison & Hunt office, 38 First St NW, Paris, TX (signed by Judge Paul Brown) cc:attys on 1-7-92 (bhs)
1/17/92	10	210	Response by Thierry Kervyn to [5-1] motion to dismiss (bhs)
1/21/92	11	218	Reply by all defendants to response to [5-1] motion to dismiss (bhs) [Entry date 01/22/92]
2/7/92	12	226	Joint motion by Thierry Kervyn, all defendants to extend time for pretrial deadlines (bhs)

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3:88cv75 Kervyn v. Depriest, et al

2/25/92	13	230	Order granting [12-1] joint motion to extend time for pretrial deadlines, staying discovery pending Ct's ruling on dfts mo to dismiss. (signed by Judge Paul Brown) cc: attys on 2-25-92 (bhs)
2/28/92	14	231	Motion by Larry K. Depriest to dismiss (bhs) [Entry date 03/02/92]
3/4/92	–		Added for Deko Land & Investme, Inc Red River Farm Manag attorney James Donald McLaughlin (bhs)
3/6/92	15	233	Response by Thierry Kervyn to [14-1] motion to dismiss (bhs)
3/6/92	16	237	Order granting [14-1] motion to dismiss granting [5-1] motion to dismiss OB Ref: v64 p08 (signed by Judge Paul Brown) cc:attys on 3-10-92 (bhs) [Entry date 03/10/92]
3/10/92	–		Case closed (bhs)
4/1/92	17	240	Notice of appeal by Thierry Kervyn Fee Status: pd Appeal record due on 5/1/92 (bhs)
4/1/92	–		Filing Fee Paid; FILING FEE $105 RECEIPT #52992 (bhs)

4/1/92	–	Notice of appeal and certified copy of docket to USCA: [17-1] appeal (bhs)
4/1/92	–	Address labels only (bhs)
4/9/92	–	Certified and transmitted record on appeal to U.S. Court of Appeals: [17-1] appeal (bhs)
4/9/92	–	Address labels only (bhs)
		Separately marked instruments included in record on appeal No 1 certified copy of docket sheet used as index

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No. 92-1618

In The

Supreme Court of the United States

October Term, 1992

THIERRY KERVYN,

Petitioner,

v.

LARRY K. DEPRIEST, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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May 1993

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STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Courts Below

Thierry Kervyn, a resident of Belgium, asserted claims including legal malpractice, fraud, and conspiracy in connection with his purchase of farm land near Clarksville, Texas (R. 1-4, 36-94). Kervyn sued (1) the land's seller, Deko Land & Investment Co.; (2) Larry K. DePriest, a director and officer of Deko; (3) Red River Farm Management, Inc., which managed the properties; (4) Glankler, Brown, Gilliland, Chase, Robinson & Raines, a Tennessee law firm that performed legal services in connection with the sale; and (5) the law firm's partners, Laurence D. Conn, Frank J. Glankler, Jr., Lee James Chase, III, Michael A. Robinson, J.N. Raines, C. Barry Ward, John I. Houseal, Joseph Karl Wilcox, K.W. Rogers, III, O.C. Carr, III, and James S. Gilliland (R. 1-4, 36-94).[1]

Kervyn's case languished on the district court's docket from December 1988 until March 1992. In part, this case's slow pace stemmed from Kervyn's two substitutions of counsel of record (R. 28-30, 156-170), and the need to obtain more detailed pleadings from Kervyn (R. 16-26, 31).

All defendants filed motions to dismiss Kervyn's suit with prejudice based on an April 24, 1990 deposition

---

[1] Glankler, Brown, Gilliland, Chase, Robinson & Raines, Laurence D. Conn, Frank J. Glankler, Jr., Lee James Chase, III, Michael A. Robinson, J. N. Raines, C. Barry Ward, John I. Houseal, Joseph Karl Wilcox, K. W. Rogers, III, O. C. Carr, III, and James S. Gilliland will be referred to collectively as "Glankler, Brown."

during which Kervyn stipulated under oath that he wished to dismiss the case with prejudice (R. 185-204, 231-32). The United States District Court for the Eastern District of Texas, Paris Division, signed the motion to dismiss with prejudice on March 6, 1992 (R. 237-239). The order dismissing Kervyn's action was entered on March 10, 1992 (R. 237). The United States Court of Appeals for the Fifth Circuit affirmed the district court's dismissal in an unpublished opinion.

Statement of Facts

Kervyn sought legal services from Glankler, Brown and partner James S. Gilliland in connection with the purchase of farm land near Clarksville, Texas in Red River County (R. 55-58). Kervyn's scattershot First Amended Complaint alleges that Glankler, Brown committed malpractice, violated the Texas Deceptive Trade Practices Act, breached fiduciary duties, and participated in making misrepresentations regarding the farm land's yields and return on investment (R. 57, 62-69, 69-74).

In April 1990, counsel for Glankler, Brown travelled at great expense to Belgium to depose Kervyn (R. 196-198). After conferring overnight with his counsel, Kervyn announced that he wanted to dismiss his case with prejudice at the beginning of the second day of the deposition:

> Q. Mr. Kervyn . . . is it true that you have made a decision that you wish to dismiss your case that has been filed here?
>
> A. Yes.

Q. And, do you understand that if you dismiss this case that it will be what American law calls "with prejudice," that is, that you will never again be able to refile this case?

A. Yes, I understand that.

Q. And, you understand that the court costs that have been spent up to this time will be your costs to be paid?

A. I can understand that.

Q. And, you understand also that at the same time that the dismissal occurs that I will withdraw from being your lawyer?

A. Yes. . . . I wish to leave now.

(R. 199-201). Kervyn then left the deposition room, never to return. In light of this dismissal, the deposition's second and third scheduled days were not completed.

Glankler, Brown filed a motion to dismiss Kervyn's case with prejudice based on Kervyn's stipulation that he wished to dismiss his case with prejudice (R. 185-186). The district court granted the motion to dismiss with prejudice on the basis of Kervyn's sworn statements (R. 237-39). In so doing the district court noted, "The statements made by the plaintiff in his deposition are clear and unequivocal. They were made under oath. Plaintiff does not now deny that he made the agreement to dismiss his suit with prejudice and left the deposition" (R. 238-39).

SUMMARY OF ARGUMENT

Kervyn's lawsuit compelled the Tennessee law firm of Glankler, Brown (R. 40) to submit to three years of litigation in Texas. At great expense, the parties travelled to Kervyn's home country, Belgium, for three days of depositions (R. 189, 198-204). Once everyone was assembled in Belgium, Kervyn made a sworn statement in response to questions by his counsel in which he voluntarily dismissed his action with prejudice (R. 198-204). Now, represented by his third attorney-of-record, Kervyn seeks to undo the effect of his stipulation and begin the process all over again. Case law and equity preclude Kervyn's belated effort to revive this wasteful litigation because the dismissal satisfies the requirements of Federal Rule of Civil Procedure 41(a)(1)(ii) as well as Texas Rule of Civil Procedure 11.

ARGUMENT

I. THE DISMISSAL WAS PROPER

Federal Rule of Civil Procedure 41(a) provides two methods for a plaintiff such as Kervyn to dismiss an action. Under Rule 41(a)(1)(ii), the plaintiff can stipulate to dismissal without a court order. Rule 41(a)(2) authorizes a district court to dismiss an action at the plaintiff's instance "upon such terms and conditions as the court deems proper." *See generally American Cyanamid Co. v. McGhee*, 317 F.2d 295, 297-98 (5th Cir. 1963).

The federal courts refuse to elevate form over substance in considering dismissals under this rule. *See Williams v. Ezell*, 531 F.2d 1261, 1263 (5th Cir. 1976). Thus, a notice of dismissal under Rule 41(a)(1) properly may be considered a motion to dismiss under Rule 41(a)(2) if that is the appropriate vehicle under the circumstances. *See Plains Growers, Inc. v. Ickes-Braun Glasshouses, Inc.*, 474 F.2d 250, 253 (5th Cir. 1973). Moreover, the conditions attached to Rule 41(a)(1) "[do] not impose an arbitrary limitation on the court's action taken under Rule 41(a)(2)." *McGhee*, 317 F.2d at 298.

Having unequivocally stipulated that he wished to dismiss his case against Glankler, Brown (R. 199-200), Kervyn now asks this Court to revive his expensive and abusive litigation. The district court and the Fifth Circuit saw through Kervyn's gamesmanship and properly put an end to it. This Court should deny Kervyn's petition for a writ of certiorari; any other result needlessly prolongs litigation that Kervyn already has abandoned.

A. The Dismissal Satisfied Federal Rule of Civil Procedure 41(a)(1)(ii)

1. A stipulation of dismissal in open court constitutes a voluntary dismissal under Rule 41(a)(1)(ii)

When a district court takes action pursuant to Rule 41(a), "All of the concepts and processes of judicial determination are brought into play." *McGhee*, 317 F.2d at 298. As the Fifth Circuit has observed, "[C]ountless elements, traditionally called upon to underpin our concepts of reasonableness and fairness, [go] into the process of

sound discretion of the trial court. . . . " *Id.* Here, the district court clearly acted within its discretion in light of Kervyn's unequivocal statements and this litigation's history.

A stipulation in open court constitutes a dismissal under Federal Rule of Civil Procedure 41(a)(1)(ii) even when no formal stipulation of dismissal is signed by all of the parties to the action and filed with the court. *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 195 (5th Cir. 1980); *Pipeliners Local Union No. 798 v. Ellerd*, 503 F.2d 1193, 1199 (10th Cir. 1974); *Harkless v. Sweeny Indep. School Dist.*, 388 F.Supp. 738, 749 (S.D.Tex. 1975), *aff'd in part and reversed in part on other grounds*, 554 F.2d 1353, 1360 (5th Cir. 1977), *cert. denied*, 434 U.S. 966 (1977). Kervyn's dismissal became effective when he stipulated on the record that he wished to dismiss his case against Glankler, Brown. *See Harkless*, 388 F. Supp. at 748-49.

The facts here parallel *Harkless*, in which the plaintiffs moved in open court to dismiss all claims against the individual defendants and stated they would incorporate the stipulated dismissal into their amended pretrial order. *Id.* Although the dismissal was never incorporated into the pretrial order, the *Harkless* court held that the plaintiffs' claim against the defendants was dismissed. "The 'notice' and 'stipulation' . . . approved by the Court were oral. [We prefer] a practical approach to the application of Rule 41 rather than a mechanistic one." *Id.* The court reasoned that the transcript clearly revealed the plaintiffs' intent to dismiss, an intent the defendants understood and acted upon. *Id.*

Similarly, in *Oswalt* the Fifth Circuit noted that it was not "deterred from finding a stipulated dismissal by the

fact that there is no formal stipulation of dismissal entered in the record. . . . " *Oswalt*, 616 F.2d at 195. The Fifth Circuit observed, "To require the filing of a formal document would be to countenance a mechanistic view of the Federal Rules of Civil Procedure and exalt form over substance." *Id. See also Pipeliners Local*, 503 F.2d at 1199 (upholding an explicit oral stipulation of dismissal in open court even though no document was signed).

Kervyn's deposition testimony clearly indicates he stipulated to a voluntary dismissal of Glankler, Brown with prejudice. In fact, Kervyn's statements could hardly evidence his intent to dismiss more clearly:

> Q. Mr. Kervyn . . . is it true that you have made a decision that you wish to dismiss your case that has been filed here?
>
> A. Yes.
>
> Q. And, do you understand that if you dismiss this case that it will be what American law calls "with prejudice", that is, that you will never again be able to refile this case?
>
> A. Yes, I understand that.

(R. 199).

Kervyn tacitly acknowledges his inability to distinguish *Harkless* and *Oswalt* when he fails even to cite them in his petition. Instead, he purports to rely on the Fifth Circuit's decision in *United States v. Transocean Air Lines, Inc.*, 356 F.2d 702, 705 (5th Cir. 1966). This reliance is misplaced.

According to Kervyn, in *Transocean Air Lines* "the 5th Circuit held that Fed. R. Civ. P. 41(a)(1)(ii) 'requires that

for a dismissal by stipulation to be effective, *the stipulation must be filed* by all parties who have appeared in the cause.' " (emphasis added). Petition For a Writ of Certiorari at p. 7. Respondents note that the purported holding is quoted inaccurately; the phrase "by all parties who have appeared in the cause" nowhere appears on page 705 of *Transocean Air Lines*. In any event, the stipulation at issue in Kervyn's case was filed when all defendants filed motions to dismiss Kervyn's suit based upon his deposition testimony (R. 185-204, 231-32).

In addition, Kervyn looks for help to *United States v. MacEvoy*, 10 F.R.D. 323, 327 (D.C.N.J. 1950), and *Vuitton et Fils S.A. v. J. Young Enterprises, Inc.*, 609 F.2d 1335, 1337 (9th Cir. 1979). Both, however, are distinguishable. Unlike Kervyn's unequivocal statements, the stipulations at issue in *MacEvoy* and *Vuitton* did not even contain the word "dismiss."

In *MacEvoy*, the United States instituted both a civil action and a criminal action against the defendant but stipulated to have its civil action removed from the calendar subject to being reinstated by the parties' consent. *MacEvoy*, 10 F.R.D. at 325. The *MacEvoy* court refused to construe this as a stipulation of dismissal because (1) it did not contain the word "dismissal"; and (2) the stipulation's purpose was merely to hold the civil action in abeyance until the criminal action had been prosecuted to conclusion. *Id.* at 327.

Likewise, in *Vuitton* the plaintiff designer sued the defendant for trademark infringement, and the plaintiff designer and defendant stipulated to the entry of injunctive orders as a result of the plaintiff's intention to file

this action. *Vuitton,* 609 F.2d at 1336. The *Vuitton* court refused to construe the stipulation as a dismissal of the plaintiff's action because the stipulation made no mention of dismissal, and because plaintiff had prayed for monetary damages and other relief as well as for an injunction in its complaint. *Id.* at 1338.

Because it is clear that Kervyn's stipulation of dismissal was intended to dispose of the entire action, the district court acted within its discretion when it dismissed this case.

2. Kervyn's stipulation of dismissal was effectively a stipulation in open court.

Kervyn's stipulation that he wished to dismiss all claims against the defendants with prejudice was, in effect, a stipulation in open court. This follows because the parties were free to enter Kervyn's deposition into evidence at trial for any purpose. Federal Rule of Civil Procedure 32(a)(2) states:

> At the trial or upon the hearing of a motion . . . any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition. . . . The deposition of a party . . . may be used by an adverse party for any purpose.

This rule applies irrespective of the party's availability. Fed. R. Civ. P. 32(a)(2); *Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 308 (5th Cir. 1978).

Given that depositions can be used in lieu of live testimony, courts have extended all rules applicable to court testimony to the deposition itself. *Naismith v. Professional Golfers Ass'n.*, 85 F.R.D. 552, 567-568 (N.D. Ga. 1979). Thus, the courts permit parties to invoke the rule during a deposition. *Williams v. Elec. Control Sys., Inc.*, 68 F.R.D. 703 (E.D. Tenn. 1975). Rule 30(c) further requires the deponent to take an oath before giving his deposition; provides that examination and cross-examination proceed as permitted at trial; and mandates the deposition be recorded stenographically unless otherwise ordered or stipulated. The ability to rely upon deposition testimony at trial has only become more important as litigants have come to rely more heavily on videotaped depositions in lieu of live testimony in an effort to reduce the length and expense of trials. Adopting Kervyn's arguments would threaten to impede the continued use and development of these time-saving techniques.

Kervyn's deposition was taken under rules applicable to courtroom testimony. Glankler, Brown was entitled to use that deposition testimony for any purpose in open court. Therefore, Kervyn's stipulation that he wished to dismiss his case was the equivalent of a stipulation in open court and constituted a voluntary dismissal under Rule 41(a)(1)(ii). *Harkless*, 388 F.Supp. at 749. *See also Oswalt*, 616 F.2d at 195 ("an oral dismissal of claims against defendants in the course of a trial was sufficient to constitute a dismissal under Rule 41(a)(1) even though there was no formal dismissal or stipulation filed with the clerk"); *Pipeliners Local*, 503 F.2d at 1199 (holding that a stipulation made in open court constitutes a voluntary

dismissal despite lack of formal agreement signed by all parties).

Kervyn cannot redraft the Federal Rules of Civil Procedure by asserting the term "open court" has its own special legal connotation requiring the parties' presence in a court room and before a judge. Kervyn has cited no federal case holding that the term "open court" requires proceedings to be held in a court room before a judge. Having failed to cite any such case, Kervyn falls back on Texas Rule of Civil Procedure 11 and tries mightily to manufacture a conflict between that rule and the disposition of this case. His effort fails.

B. The Dismissal Satisfied Texas Rule of Civil Procedure 11

Kervyn cannot conjure up a question worthy of certiorari by attempting to manufacture a conflict between Texas Rule of Civil Procedure 11 and the disposition of this case. The district court's dismissal and the Fifth Circuit's affirmance comply not only with the letter of Rule 11, but also with the case law interpreting that rule.[2]

As an initial matter, respondents note that the dismissal comports with Rule 11's bare terms. The rule states,

---

[2] Respondents do not concede that Texas Rule of Civil Procedure 11 applies here. This matter focuses on the enforceability of Kervyn's unilateral decision to dismiss his lawsuit, not on an "agreement" between the parties. However, the Court need not reach this issue because nothing in Rule 11 precludes the district court's dismissal even if one assumes *arguendo* that Rule 11 applies.

> Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record.

Tex. R. Civ. P. 11. As demonstrated above, the stipulated dismissal at issue here was made "in open court" for purposes of dismissal and therefore is valid and binding upon Kervyn.

Moreover, Kervyn cannot prevail even if one assumes the stipulation was not made "in open court." The literal terms of Rule 11 do not apply in all circumstances; as the Texas Supreme Court recently observed, its holding "that Rule 11 means precisely what it says . . . should not be interpreted as requiring 'slavish adherence' to the literal language of the rule in all cases." *Kennedy v. Hyde*, 682 S.W.2d 525, 529 (Tex. 1984). On the contrary, "[A]n undisputed stipulation may be given effect despite literal noncompliance with the rule." *Id.* (citing *Thomas v. Smith*, 60 S.W.2d 514, 516 (Tex. Civ. App. – Texarkana 1933, writ dism'd).

In determining whether a particular situation warrants an exception to Rule 11, an examination of the policy behind the rule is always paramount. The Texas Supreme Court has described the policy behind Rule 11 as follows:

> The reason for Rule 11 is clear. . . . [O]ral agreements concerning suits 'are very liable to be misconstrued or forgotten, and to beget misunderstandings and controversies.'

Id. (quoting *Birdwell v. Cox*, 18 Tex. 535, 537 (1857)). Here, Kervyn does not dispute that he agreed to dismiss his case. Nor could he. The court reporter accurately transcribed Kervyn's stipulation of dismissal; there is no possibility that his oral agreement will be misconstrued or forgotten. To be sure, Kervyn changed his mind. But that change of heart in no way releases him from his stipulation after it has been made part of the record and filed in court. This is especially apparent given that the motion to dismiss (with the attached deposition excerpts) was filed many days *before* Kervyn reneged and backed away from his sworn deposition testimony.

Case law confirms this common-sense notion. In *Sone v. Braunig*, 469 S.W.2d 605, 611 (Tex. Civ. App. – Beaumont 1971, writ ref'd n.r.e.), the court held that Rule 11 is confined to negotiations made before the commencement of the actual trial at a time when the court reporter is not in attendance, or to negotiations made outside the presence of the court when a court reporter is not in attendance. Because a court reporter was in attendance at Kervyn's deposition, and accurately transcribed his statements, his Rule 11 argument must fail because the terms of the stipulation are not in dispute. *See Swartzberg v. City of Temple*, 212 S.W.2d 1016, 1017-18 (Tex. Civ. App. – Austin 1948, no writ) (validating undisputed oral agreement to postpone hearing of case until after party's return from New York); *Thomas v. Smith*, 60 S.W.2d 514, 516 (Tex. Civ. App. – Texarkana 1933, writ dism'd) (enforcing oral agreement between attorneys that abstract of title could be used as evidence).

Similarly, Kervyn cannot look for help to the Fifth Circuit's decisions in *Valley Ranch Devel. Co., Ltd. v. Federal Deposit Insurance Corp.*, 960 F.2d 550 (5th Cir. 1992), or *Anderegg v. High Standard, Inc.*, 825 F.2d 77 (5th Cir. 1987). Unlike this case, *Valley Ranch* focuses on a purported agent's ability to bind a party to a settlement agreement when that party later refuses to approve the settlement. *Valley Ranch*, 960 F.2d at 553-54. Here, there is no question of agency; the stipulation of dismissal with prejudice was elicited from Kervyn's own mouth at his deposition.

Nor does *Anderegg* provide any relief. In *Anderegg*, the Fifth Circuit held that no enforceable settlement agreement arose under Rule 11 in a situation in which plaintiffs' counsel announced a purported settlement in open court followed by the defendant's immediate denial of any such settlement. *Anderegg*, 825 F.2d at 78-79. In these circumstances, the Fifth Circuit held that no Rule 11 settlement agreement arises when "the terms are shouted at the bench by counsel for one side and immediately repudiated by the other. . . . " *Id.* In the present case, in contrast, Kervyn stated his stipulation for the record; his statements then were filed of record as part of a motion to dismiss on January 2, 1992 (R. 185-204), and became effective at that time. Kervyn did not even attempt to neutralize his stipulation until January 17, 1992 – long after it had been filed of record. Even at that point, Kervyn identified no misunderstanding or inaccuracy; he simply changed his mind after it was too late to do so (R. 210-17). Nothing in Rule 11 requires reversal under these circumstances.

Because the terms of Kervyn's stipulation are not in dispute, the documents necessary to memorialize the

stipulation are a motion to dismiss and an order of dismissal. The respondents satisfied these requirements, and the district court properly dismissed the case after respondents did so.

CONCLUSION AND PRAYER

Kervyn stipulated to a dismissal with prejudice. The only factor that has changed since Kervyn stipulated to dismissal under oath is the appearance of yet another attorney seeking to revive this action. Kervyn, who already has had more than three years to develop a case against Glankler, Brown, voluntarily abandoned his effort after putting the defendants to great expense. In light of these facts, this Court should reject Kervyn's belated effort to resurrect this case and subject Glankler, Brown to another wasteful round of litigation. Kervyn has failed to demonstrate the existence of any issue in this case worthy of a writ of certiorari from this Court.

Respondents Glankler, Brown ask this Court to deny Kervyn's petition for a writ of certiorari. Respondents

further request all other relief to which they may be entitled.

Respectfully submitted,

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